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QUESTIONS RELATING TO TIME IN CASES OF SPECIFIC PERFORMANCE.

Second Paper.[1]

ENGLISH CASES OF THE PERIOD OF LORD ELDON.

In the few cases of the eighteenth century which discuss the effect of delay on the part of the plaintiff in seeking specific performance, we found that there appeared to be the underlying assumption that one must be diligent in asserting his rights in equity.[2] The first cases of the nineteenth century relate to this branch of our subject;[3] they are *Hertford* v. *Bore*[4] and *Guest* v. *Homfray*.[5] The contrast between them is instructive. In the first case the vendor and the vendee of land entered into extended ne-

[1] The First Paper dealing with the English cases of the eighteenth century will be found in 50 A. L. R. (O. S.), 639.

[2] 50 A. L. R. (O. S.), 649.

[3] The other branches are: Those which discuss the amount of time which, in the contract sought to be enforced, the plaintiff had to fulfill his promises, and those which deal with the consequences of an admitted default in respect to time. See 50 A. L. R. (O. S.), 639.

[4] 5 Ves. 718, 1801.

[5] 5 Ves. 818, 1801.

gotiations in respect to the title. The vendee remaining unsatisfied with the title, the vendor wrote to him asking him to say positively whether he would take the title or not. The vendor also said that if the vendee did not act he, the vendor, would have to file a bill against him. The vendee returned no answer to this letter. The vendor did not bring his bill for fourteen months. Lord Loughborough sets aside the defence of laches, remarking that "one can easily imagine circumstances might have happened that would have made it peevish to have done it immediately."[6] In the second case, the vendor's solicitor informed the vendee that no better title could be made than the one exhibited. The vendee at once gave notice that he repudiated the contract. The vendor, without notice to the vendee, took steps to remove his objections to the title, and in slightly less than a year submitted another abstract. The vendee refused to go on, and the vendor brought his bill. Arden, in sustaining the defendant's objection on the score of delay, takes the position that the plaintiff, on being notified that the defendant considered the contract at an end, should have promptly brought his bill or told the defendant that he would shortly remove the objections to the title.[7] The contrast between these cases indicates a tendency to require more prompt action on the part of the plaintiff in bringing his bill if he has received definite notice of the other party's intention to avoid the contract if he can, than is required when the negotiations concerning execution have ceased without any positive stand having been taken by either party. The remaining cases of the period under discussion, belonging to this class, serve merely to emphasize this distinction and illustrate what the court considers a fatal lack of diligence on the part of a plaintiff in bringing his bill.[8]

[6] P. 720.

[7] P. 823.

[8] The other English and Irish cases, in the first quarter of the nineteenth century, are: *Moroe* v. *Blake,* 1 B. & Bat. 63, 1808 (The vendor, after bringing his bill and being dispossessed of the land, waited nineteen years before pressing his suit. The plaintiff alleged poverty as an excuse. The bill was dismissed); *Wright* v. *Howard,* 1 Sim. & Stu. 190, 1823. (Fourteen years had elapsed between the contract, which was for

The other cases we shall discuss deal with the meaning of clauses relating to the time of fulfillment of the contract. Lord Eldon in *Paine* v. *Meller,*[9] the first case involving time coming before him, followed the thought first expressed by Wilson in *Pincle* v. *Curteis;*[10] that, in a contract for the sale of land, the vendee waived any right he might have had to refuse to take the land after the time fixed in the contract for a conveyance, by continued discussion of the title after the day had passed.[11]

It will be remembered that one of the questions which the eighteenth century cases left unsettled was, whether it was possible for two persons contracting for the sale of land to provide that if a good title could not be made out by a particular day the contract was to be at an end, Lord Loughborough holding that there was no reason why this should not be done, while Thurlow seems to have denied the right of the parties to make the termination of the contract depend on such a circumstance.[12] In the case just mentioned, *Paine* v. *Meller,* Lord Eldon intimates that as a day had been fixed for the completion of the sale, and the vendor was not ready with a good conveyance on this

the sale of land for mill purposes, and the argument. The delay seems to have been due partly to the plaintiff, but principally to the death of one of the parties and the rules of the court. Vice-Chancellor Leach dismissed the bill); *Heaphy* v. *Hill,* 2 Sim. & Stu. 29, 1824. (Vendee gave notice of repudiation. Vendor waited nearly two years before bringing bill. Bill dismissed without comment.)

[9] 6 Ves. 349, 1801.

[10] 4 Bro. C. C. 329, 1793, 332; *supra,* 50 A. L. R. (O. S.), 645.

[11] The same idea appears again in *Seton* v. *Slade,* 7 Ves. 264, 1802, 271, 277; *Wood* v. *Bernal,* 19 Ves. 220, 1812; *Levy* v. *Lindo,* 3 Merv. 81, 1817, 841. These were all cases decided by Lord Eldon. In the first he regarded the fact that the defendant was willing to receive and examine an abstract of title within five days of the alleged time for completion, which abstract was not returned before the time, as conclusive evidence of waiver. In *Hudson* v. *Bartram,* 3 Mad. 440, 1818, Vice-Chancellor Leach drew the same inference from the fact, that the defendant, when the assignee of a lease did not pay on the day promised, not only failed to take steps to dispossess him, but sent him the landlord's bill for rent.

[12] *Lloyd* v. *Collett,* 4 Bro. C. C. 470, 1793, *supra* 50 A. L. R. 645, 646. *Greson* v. *Riddle,* 1783, reported in *Seton* v. *Slade,* 7 Ves. 268, *supra,* 59 A. L. R. (O. S.) 643, 644.

day, the vendee had his choice "to go on with the bargain or to repudiate the contract,"[13] thus at the outset apparently taking the position that the parties to a contract for a sale of real property can fix a time for its completion, and also intimating that when the contract provides that the purchase money shall be paid on a particular day, "when a good conveyance will be made," the vendor must be ready with his title on this day if he would put himself in a position to insist on a specific performance.[14] This dicta of Eldon's, however, did not remove all doubt as to the correctness of Lord Loughborough's position as opposed to that of Lord Thurlow, for the next year Sir William Grant, in *Wynn* v. *Morgan*,[15] expressed the opinion "that it would contradict the whole current of authorities," to say that "if the plaintiff cannot make a completely good title at the time the contract ought to have been carried into execution, he never can come for an execution."[16] His idea appears to have been that when a time is fixed for the completion of a contract, in order that the defendant may successfully set up the failure of the plaintiff to complete on time, he must allege and prove that the completion on time was material to him.[17]

The next and perhaps the leading case of the period in

[13] P. 351.

[14] For Lord Eldon's subsequent repudiation of this last position, see note 29, *infra*.

[15] 7 Ves. 202, 1802.

[16] P. 205.

[17] The defendant in the case before Sir William Grant, instead of alleging that time was material to him, took the position that as a good title could not have been made on the day provided for completion, the agreement was not reciprocal. To have acceded to this argument the court would have had to have reversed those cases where the plaintiff had had specific performance, though he had not a good title at the time the bill was brought. In none of these cases was the position taken, that the plaintiff had broken a condition precedent by non-fulfillment on a particular day. In the case before the court an exact time of completion was either an element of the contract or it was not. Counsel, by omitting to argue this question, and relying on want of mutuality as a defence, were met by the settled principle referred to, that it was not necessary for the vendor to have a good title at the time he brought his bill. Compare *Dyer* v. *Hargrave*, 10 Ves. 505, 1805, 508.

reference to time is one decided by Lord Eldon, *Seton* v. *Slade*.[18] The opinion considered as a whole tends strongly towards what we may call "a lenient dealing with the element of time," at least in a contract for the sale of real property.[19] The opinion begins with the assertion that time is not treated at law as in equity, instancing the case of forfeitures, though with characteristic caution the chancellor refuses to assert, whether, in the case of contracts for purchase, there is a different rule in equity in regard to time than there is at law.[20] He mentions a reason for regarding the question of time in such contracts differently in the two courts; namely, that in equity, though not at law, the land from the moment of the contract of purchase is the land of the vendee.[21] He also asserts that the cases before Lord Thurlow go upon the fact of the difficulty of making clear titles to estates, which caused the court to regard objections on the score of delay as "frivolous." The paragraph as a whole leaves one with the impression that he sympathizes with both of these positions.[22]

The chief importance of the case, however, lies in Lord

[18] 7 Ves. 264, 1802.

[19] The facts of the case are of little importance. There was a contract for the sale of an estate, the purchase money to be paid within two months. Lord Eldon held that this did not obligate the vendor to complete the title within that time, though the inference is that the purchaser need not pay until he gets a good title. This was all that was absolutely necessary for the decision. The defendant alleged that subsequent to the contract the parties agreed on an exact day; Lord Eldon did not think so, but, as previously pointed out (note 11 *supra*) held, that if they had, by his subsequent conduct the defendant had waived a completion on the day.

[20] P. 273. In *Lloyd* v. *Collett,* as reported in Mr. Vesey's note to *Harrington* v. *Wheeler,* 4 Ves. 690, Lord Loughborough, speaking of this subject, takes the position, that: "There is a difficulty to comprehend how the essentials of a contract should be different in equity and at law." Lord Erskine, in speaking of a contract to purchase an annuity, in *Radcliffe* v. *Warrington,* 12 Ves. 326, 1806, 333, adopts Lord Eldon's position, that time is treated differently at law than in equity.

[21] P. 274.

[22] Pp. 274, 275. The warrant for Lord Eldon's assertion in regard to "cases before Lord Thurlow" must be his personal recollection. The assertion cannot, as far as the writer is aware, be gathered from reported cases.

Eldon's contribution to the question whether the time of completion can be an element of the contract which if not lived up to terminates the contract. In a preliminary opinion he intimates that time may be made of the essence of the contract.[23] Later, in his main opinion, he again refers to the same idea, saying: "I do not say, whether terms might or might not be introduced, that would make time expressly of the essence of the contract."[24]

It will be noticed that Lord Eldon does not say positively that time may be of the essence of a contract, but he subsequently made a positive assertion to this effect in *Levy* v. *Lindo*.[25] He, however, never seems to have had any con-

[23] P. 270. This idea that the question to be determined was whether "time was of the essence" of the contract had been, as we have noted (*supra* 50 A. L. R. [O. S.], 647), first dwelt on by Chief Baron Macdonald in *Jones* v. *Price*, 3 Austr. 924, 1795, 925.

[24] P. 275. In spite of these sentences the tendency of the entire case is so strongly in favor of lenient dealing with alleged requirements in respect to time, that Sir William Grant in *Hall* v. *Smith*, 14 Ves. 426, 1807, 433, says: "As to time, the case of *Seton* v. *Slade* is a modern recognition of the doctrine of Lord Hardwicke, that time is not of the essence of the contract."

[25] 3 Mer. 81, 1817, 84. Lord Eldon here says that Lord Thurlow on occasions without number said that "time is not the essence of the contract, and that not even the agreement of the parties can make it so." He then adds: "I have deviated from that rule, so far as to say that time may, in certain cases be of the essence of a contract." On which it need only be said that Lord Thurlow does not seem to have spoken of "the essence of a contract" in connection with time in any reported case; that the reported cases before Thurlow involving the question do not exceed three, and that there is no record of Lord Eldon, having before this time positively taken the position that the parties could make time essential. Lord Eldon again asserts that time may be of the essence of the contract in *Boehm* v. *Wood*, 1 J. & W. 419, 1820, 420, saying, "When I came into this court the doctrine was, that you could not make time the essence of the contract. I attempted to overrule it, and I hope on satisfactory grounds." Here he ignores the position taken by Lord Loughborough, see *supra* 50 A. L. R. (O. S.), 645, who much more than Eldon set his face against the reported position of Thurlow. Vice-Chancellor Leach in *Hudson* v. *Bartram*, 3 Mad. 447, 1818, 447, gives Lord Eldon the credit of having settled the long doubt whether time could be made of the essence of the contract. This much is undoubtedly Lord Eldon's due. Though the opinions in all the cases quoted are dicta, as in all time was held not to be of the essence of the contract before the court, we do not find any doubt after 1817 that

tract before him in which he could be induced to consider any particular time for the plaintiff to fulfill his promises, as essential to his right to recover. Thus in *Levy* v. *Lindo,* just referred to;[26] he says, that in order to make time of the essence of the contract it must be shown to be so by the terms of the contract. Yet what terms will make time of the essence is doubtful, for in *Boehm* v. *Wood,*[27] he said he did "not find a single special word . . making time the essence of the contract,"[28] though the contract in that case, which was for the sale of an estate, provided "that an abstract of title should be made out and delivered by the tenth of August," and "that the conveyance should be executed on or before September 29."[29] Two years earlier Vice-Chancellor Leach, in *Hudson* v. *Bartram,*[30] had assumed, that where a time was fixed for the payment for an assignment of a lease, and the contract contained an express provision that in case of non-payment the lease was to be void and a penalty paid by the lessee, time was of the essence of the contract;[31] but in *Reynolds* v. *Nelson,*[32] like Lord Eldon in *Boehm* v. *Wood,* he assumes that fixing

time may be made the essence of the contract, though in that year such a doubt was intimated by Chief Baron Richards in *Warde* v. *Jeffery,* 4 Price, 294, 297.

[26] 3 Mer. 81, 1817, 84.

[27] 1 J. & W. 419, 1820.

[28] P. 422.

[29] On September 29 the defendant needing a house for immediate residence repudiated the contract. From the report it is doubtful whether on September 29 the plaintiff could or could not have made a good title. If he could, the question of time is not really in the case, and the part of the opinion referred to is dictum. The later opinion, delivered on May 30, 1820 (see page 422), leaves the impression, that if a good title could then be made specific performance would be granted. Compare with the earlier case of *Paine* v. *Meller,* 6 Ves. 349, 1801, where he intimates that the vendee can terminate the contract when the contract provides that the money shall be paid and the conveyance made on a given day and on that day a good title cannot be made out. *Supra,* note 9.

[30] 3 Mad. 440, 1818, 447.

[31] The opinion was in a sense dictum as he held the provision in regard to the time of payment had been waived.

[32] 6 Mad. 18, 1821, 26.

a date for the conveyance in a contract for the sale of real property does not make time of the essence of the contract.[33]

In the cases of the eighteenth century we found traces of the idea that the situation of the parties or the nature of the subject matter should have a bearing on the legal effect of a lapse of time.[34] The idea reappears in the first quarter of the nineteenth century, in the thought that the nature of the subject matter affects the question whether time is of the essence of the contract. In *Levy* v. *Lindo*,[35] Lord Eldon admitted that there was no species of purchase where time could with more reason be considered of the essence of the contract, than in the case of a purchase of a residence,[36] though in the later case of *Boehm* v. *Wood*,[37] he takes the position, that unless the defendant has made time of the essence by express words, he cannot say, that time is of the essence because he intended to use the land purchased as a residence. On the other hand, in *Whitby* v. *Cottle*,[38] he says: "It has never been denied that the property may be of such a nature, as to make time of the essence of the contract, although the contract does not contain one

[33] See also for a similar assertion *Warde* v. *Jeffery*, 4 Price, 294, 1817, 297, per Richards, Chief Baron. In the next reported case, *Morse* v. *Merest*, 6 Mad. 26, 1821, Vice-Chancellor Leach apparently takes the position that, where in a contract of sale the price is to be fixed by valuers appointed by the parties, who shall report on or before a certain day, that the time for the report is of the essence of the contract. At least he is reported to have said that, "in the case of a reference, time is as essential in equity as at law." See page 27. The matter is dictum as the defendant in the case before him had prevented the valuation and had no right to set up a delay arising out of his own misconduct.

[34] *Hayes* v. *Caryll*, 1 Bro. P. C. 126, Tom. Ed. 1702; *Newman* v. *Rogers*, 4 Bro. C. C. 391, 1793, 50 A. L. R. (O. S.), 640, 646, 647.

[35] 3 Merv. 81, 1817, 84.

[36] Before this, in the case of the *City of London* v. *Milford*, 14 Ves. 41, 1807, 58, he pointed out, that there was great difference in the effect of a default in notifying the landlord of a desire for a renewal of a lease, where the lease is for a term of years and where it is for lives, the presumption being that greater strictness is required in a term of years. He also points out that the nature of the subject "especially a colliery" might make a difference.

[37] 1 J. & W. 419, 1820, 422.

[38] 1 T. & R. 78, 1823.

single word about it."[39] Comparing the opinions in the two cases, they may be said to indicate a belief, that, though the situation and intention of one of the parties has no effect on the question of whether time is of the essence of the contract unless it is so made by express terms, the nature of the subject of the contract, apart from the particular use intended by the purchaser, has an important bearing on the question. Vice-Chancellor Leach lays emphasis on the last mentioned principle in *Doloret v. Rothschild.*[40] He says: "Where a court of equity holds that time is not of the essence of a contract, it proceeds upon the principle, that, having regard to the nature of the subject, time is immaterial to the value, and is urged only by way of pretence and evasion." But he adds: "That principle can have no application where the subject matter of the contract is stock, which, "from the nature of the subject . . . is exposed to daily variation."[41]

In the case of *Warde* v. *Jeffery,*[42] before referred to, the court was of the opinion that time was not of the essence of the contract, or at least if it were the defendant had waived by continuing to discuss the title after the alleged time for completion. In this case, after a long course of negotiation, the defendant, without any previous

[39] P. 79. The case was a contract for the purchase of an annuity. A time was fixed for the payment of the purchase money. Whether time was of the essence of the contract or not was not finally decided.

[40] 1 Sim. & Stu. 590, 1824.

[41] Pp. 598, 599. The case before him was not exactly a sale of stock. The plaintiff had had an option to purchase stock of the defendant, provided he paid on a day certain. The defendant voluntarily extended the time when the option could be taken up. The plaintiff, who in the case sought the stock, had not taken up the option even on the day to which his right to do so had been extended. The bill was dismissed. See *Parker* v. *Frith,* 1 Sim & Stu. 199, note, 1819, for a case where there was a lease of an iron foundry, and a delay occurred on the part of the vendor of the lease in making a good title, the delay amounting to about nine months. The vice chancellor "considering the object of the agreement" refused to direct a specific performance. In *Wright* v. *Howard,* 1 Sim. & Stu. 190, 1823, 205, he refuses to make "any general declaration as to the distinction between land contracted for as mere property and land contracted for with a view to be used for a commercial establishment."

[42] 4 Price, 294, 1817. Ante, note 25.

notice, declared the contract off. This the court held he could not do.[43] This case would seem to hold, that where the time of completion has not been made by the parties to the contract an essential element, or having been so made, it has been waived, one of the parties, without the consent of the other, cannot insist on any particular time of completion. Yet Vice-Chancellor Leach, discussing this subject, in *Reynolds* v. *Nelson*,[44] refuses to decide whether, when time was not of the essence of a contract, it can be made essential by one of the parties giving notice to the other to complete on a particular day.[45] The cases during the period under discussion therefore, may be said to have done no more than raise this interesting and important question.

It remains to mention but two other ideas or principles in relation to our subject found in the cases of the period under discussion. One is announced by Lord Redesdale; namely, that the failure of a person in possession of property for which he has paid, to demand a formal conveyance for an indefinite time does not deprive him of a right to seek such conveyance.[46] The other principle is, that when

[43] P. 298.

[44] 6 Mad. 18, 1821.

[45] P. 26. In the case before him the court thought that time was not originally of the essence of the contract. The vendor notified the purchaser that if he did not complete by a day named he would consider him as refusing to perform his agreement. Leach, V. C., thought that this was not a notification that the vendor in case of the vendee's non-settlement would then regard the contract as terminated. In *Stewart* v. *Smith*, 6 Hare, 222, note, 1824, the defendant having abandoned the contract (apparently he was justified in so doing owing to vendor's delay and the state of the title) signified his willingness to go on provided title could be made immediately. In this case Vice Chancellor Leach of course regarded immediate completion as essential. From the final sentence of his opinion, however, it might be inferred that one party by specifying a time for completion, even after the contract had been entered into, could make time essential. See page 223.

[46] *Crofton* v. *Ormsby*, 2 Sch. & Lef. 583, 1806, 602, 603. Where the purchaser is in possession and fails to offer to pay the purchase money until long after the time stipulated, his laches may of course defeat his right to specific performance; see as an example, *Alley* v. *Deschamps*, 13 Ves. 225, 1806, where the purchaser was let into possession in 1797, promising to pay the purchase money in two, four and six years. He

the failure of the plaintiff to complete his promise on time is due to an act of the defendant, the defendant cannot set up the delay.[47]

A striking circumstance in relation to this period is that practically nothing is said of the possibility of treating time as an element of the contract the breach of which can be compensated by the payment of money damages by the defaulting party, though this was the period in which the practice of giving specific performance with compensation to the defendant for the inability of the plaintiff to perform all his promises, was first recognized.[48]

To compare for a moment the cases of the period we have just discussed with those of the eighteenth century. In the earlier cases, down to and including the time of Lord Thurlow, we find dominant the thought that time may be disregarded by a court of chancery, even though the parties intended it to be an element of the contract. The reaction from this position is found in the decisions of Lord Loughborough, who would treat provisions in regard to time in a contract like provisions in regard to anything else. Lord Eldon, by his emphasis on the idea that the

never paid anything except the first deposit, and in 1800 became a bankrupt. The bill was brought in 1802 by his assignees. Erskine, C., dismissed the bill without any real discussion. Nothing is said about the payment of interest as compensation for the delay. There was no excuse for the delay except that the purchaser lacked the necessary funds.

[47] Stated by Vice Chancellor Leach in *Morse* v. *Merest,* 6 Mad. 26, 1821, 27.

[48] As early as the case of *Vernon* v. *Stephens,* 2 P. Wms. 66, 1722, the thought was advanced that interest was always compensation for the non-payment of money on time. (50 A. L. R. [O. S.], 642.) This was denied by Lord Loughborough in *Newman* v. *Rogers,* 4 Bro. C. C. 391, 1793 (50 A. L. R., 646). In *Omerod* v. *Hardman,* 5 Ves. 722, 1801, 732, Justice Chambre said that compensation could be given for the non-delivery of possession at the time stipulated. (50 A. L. R. [O. S.], 651.) Sir William Grant makes a similar suggestion in *Dyer* v. *Hargrave,* 10 Ves. 505, 1805, 508. As far as the writer is aware there is no other mention of the subject during Lord Eldon's time. We do not even find it discussed in a case like *Alley* v. *Deschamps,* 13 Ves. 225, 1806, where there was delay on the part of the plaintiff in the payment of the purchase price, and the defendant was in possession.

question to be decided is always whether time is the essence of the contract before the court, and even by his repeated express recognition of the fact that provisions in regard to time may be waived by the parties, changes the whole point of view from that which would ask "What provisions of the contract in regard to time may we disregard?" to "What is the real intention of the parties in regard to time? How much importance did they attach to it?" This change in the method of examining the cases presented marks a real advance. That Lord Eldon himself strongly reacted to the feeling that time, at least in contracts respecting the sale of real estate, was of litle importance cannot be questioned. Looked at merely from the facts of the cases before him and his decisions, the period would appear to represent considerable disregard of stipulations in respect to time. This effect is in part neutralized by the repeated statement, that the parties might have provided for the exact fulfillment of the condition in respect to time. The employment of the word "essence" was in a sense unfortunate. The term "of the essence of a contract" is not clear. In relation to time it may mean merely that time is part of the contract. If this is the intended meaning, the statement, "that time is part of the contract," would be less liable to be misunderstood. For the term "of the essence of the contract" may also mean, that there are two kinds of provisions in contracts, the essential and the non-essential, the inference being that a court of equity will disregard the non-essential. Yet the very possibility of taking one or both of these meanings from the expression, well suited the mental attitude of Lord Eldon. He saw clearly that what should be ascertained was the importance to the parties of the element of time. To him this perception was sufficient. It was not a need of his intellect that he should analyze his own point of view to determine, whether he was really trying to ascertain whether time was part of the contract, or admitting it to be part, an important part. In nine cases out of ten the result would be the same. The very lack of entire clearness in the expression reflected the lack of logical or orderly analysis characteristic of the great Chancellor. The expression served to direct the

attention to the fact that the real intention of the parties in respect to time was the problem which the courts had to solve, and for Lord Eldon that was enough.

In the next paper I hope to conclude the examination of the English cases.

William Draper Lewis.